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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1990

ANTON JUNGHERR,
Petitioner,

VS.

SAN FRANCISCO UNIFIED SCHOOL DISTRICT
BOARD OF EDUCATION,
and MYRA KOPF,
former President of the Board,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether the prosecution by a local school board and its president, the latter acting in her official capacity, of a civil action against an individual for defamation infringes, in and of itself, the individual's First Amendment right to freedom of expression.

2. Whether in a complaint for violation of 42 U.S.C. § 1983 on the part of a local school board and its president, an allegation that the president acted in her official capacity suffices, for § 1983 purposes, as an allegation of official school board policy and hence of conduct under color of law.

PARTIES TO THE PROCEEDINGS BELOW

All parties to the proceedings below are listed in the caption.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioner, Anton Jungherr, respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit entered in the above-entitled proceeding on January 17, 1990.

OPINIONS BELOW

The decision of the United States Court of Appeals for the Ninth Circuit is reported at 923 F.2d 743, and is reprinted in the Appendix ("App.") to this Petition at p. A-1. The order of the

United States District Court for the Northern District of California, entered on February 13, 1989, is unreported; it is reproduced in the Appendix at p. A-6.

JURISDICTIONAL STATEMENT

This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1). The Court of Appeals filed its decision on January 17, 1990.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment to the Constitution of the United States provides in pertinent part as follows:

> "Congress shall make no law . . . abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

Section 1 of the Fourteenth Amendment to the Constitution provides in pertinent part as follows:

> " . . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

42 U.S.C. § 1983 provides as follows:

> "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

Rule 12(b)(6) of the Federal Rules of Civil Procedure provides as follows:

> "Every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counterclaim, cross-claim, or third-party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion: . . . failure to state a claim upon which relief can be granted,. . . ."

STATEMENT OF THE CASE

The subject of this suit under 42 U.S.C 1985 is a prior action brought against petitioner in the California Superior Court by respondent Myra Kopf ("Kopf") in her official capacity as President of the Board of Education of the San Francisco Unified School District ("Board of Education" or "Board") (Myra Kopf, as President etc., v. Anton Jungherr, Cal.Super.Ct. San Francisco City & County, 1988, No. 865176). The prior action was for defamation.

In the prior action, the state court entered summary judgment in favor of petitioner. Thereafter, petitioner brought this suit in the District Court against respondents Kopf and Board of Education.[1] Petitioner invoked the District Court's federal question jurisdiction. App. A-9. In this suit, petitioner has sought to recover monetary damages occasioned by the state court defamation action and his defense against it. He also has sought an award of punitive damages. App. A-10-11.

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[1]Having alleged that respondent Kopf acted in her official capacity as president of the Board of Education (App. A-8-9), petitioner attributed her action to the Board and joined the Board as a defendant in this suit. See *Brandon* v. *Holt*, 469 U.S. 464, 469-470, 83 L.Ed.2d 878, 105 S.Ct. 873 (1985). Which is not to say that under the allegations of the complaint, respondent Kopf cannot be held personally liable as well. See *Kentucky* v. *Graham*, 473 U.S. 159, 167, fn. 14, 87 L.Ed.2d 114, 105 S.Ct. 3099 (1985).

The District Court dismissed petitioner's complaint, with prejudice, pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, upon the ground that the complaint failed to state a claim upon which relief can be granted. App. A-7. Petitioner appealed from the order of dismissal. The Court of Appeal affirmed.

In his complaint, petitioner alleged that on or about September 17, 1986, at a public meeting of respondent Board of Education, he made statements concerning respondent Kopf's handling of board business. At that time, petitioner also alleged, respondent Kopf was the Board's president as well as a candidate for reelection to the Board. App. A-9.

Petitioner went on to allege that after the meeting, but before the Board of Education election, respondents, "acting pursuant to the statutes of the State of California, and to the ordinances, resolutions, regulations, customs, usages, and policies" of the Board of Education, brought the defamation action against him. App. A-9-10.

The bringing of such an action, petitioner charged in his complaint, violated his right to free speech under the First Amendment and his Fourteenth Amendment due process and equal protection rights. App. A-10. Thus his single count complaint under 42 U.S.C. § 1983.

In its order of dismissal, the District Court noted that "[a] citizen's right to criticize his government is at the heart of the first amendment." App. A-7. It quoted the decision of the District of Columbia Circuit in *Washington Post Co.* v. *Keough*, 765 F.2d 965, 968 (1966), cert. den., 385 U.S. 1001 (1967), to the effect that "[t]he threat of a defamation action by a 'public official may be as chilling to the exercise of First Amendment freedoms as fear of the outcome of the lawsuit itself.' " App. A-7.

The District Court held, however, that respondents' prosecution of a defamation action against petitioner did not of itself violate his First Amendment right to freedom of expression. Quoting from the decision of this Court in *Calder* v. *Jones*, 465 U.S. 783, 790, 79 L.Ed.2d 804, 104 S.Ct. 1482 (1984), the District Court stated that " 'the potential chill on protected First

Amendment activity stemming from libel and defamation actions is already taken into account in the constitutional limitations on the substantive law governing such suits.' " App. A-7.

The decision of the Ninth Circuit affirming the order of the District Court contains alternative holdings. The Court of Appeals held that petitioner's complaint did not state a cause of action under § 1983 because petitioner "does not point to a statute, ordinance, regulation, custom or usage that subjected him to the alleged deprivations of his first and fourteenth amendment rights." App. A-3.

The Ninth Circuit also held that respondents' prosecution of a defamation action against petitioner did not violate his First and Fourteenth Amendment rights. The Ninth Circuit, like the District Court, reasoned that the requirement of proof of actual malice, as laid down in *New York Times Co.* v. *Sullivan*, 376 U.S. 254, 11 L.Ed.2d 686, 84 S.Ct. 710, 95 A.L.R.2d 1412 (1964), provided sufficient protection for petitioner's First and Fourteenth Amendment rights.[2] The Court of Appeals, too, relied upon *Calder* v. *Jones*, *supra*. It stated that petitioner in this case,

> "like the petitioner in *Calder*, is free to exercise his first amendment right. That right, however, does not encompass a guarantee that he will never need to defend the speech in court. Once in court, however, any libel or defamation challenge to the exercise of the first amendment right must satisfy the strict *New York Times* standard."

App. A-4.[3]

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[2]In *New York Times*, this Court held that by reason of the First Amendment, a public official may not recover damages in an action for a defamatory statement regarding his or her official conduct without proof that the defendant made the statement with actual malice, defined by the Court as "knowledge that it was false or . . . reckless disregard of whether it was true or not." 376 U.S. at 280-281.

[3]The Ninth Circuit cited as well the order in *Laxalt* v. *McClatchy*, 622 F.Supp. 737 (D.Nev., 1985). App. A-5. There, a District Court gave its view that the filing of a defamation action by a public official in his or her official capacity does not work to chill the First Amendment right to

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REASONS FOR GRANTING THE WRIT

I.

THE DECISION OF THE NINTH CIRCUIT REGARDING THE SUFFICIENCY OF THE PROTECTION AFFORDED BY THE ACTUAL MALICE STANDARD OF *NEW YORK TIMES CO.* v. *SULLIVAN* TO PETITIONER'S FIRST AMENDMENT RIGHT TO FREE EXPRESSION, AS AGAINST A DEFAMATION ACTION BY A LOCAL GOVERNMENT ENTITY, IS IN CONFLICT WITH DECISIONS OF COURTS OF LAST RESORT OF FOUR STATES.

A. The Supreme Courts of Illinois, Tennessee, And Georgia Have Held That Criticism Of Government Is Absolutely Privileged As A Matter Of Constitutional Right And, Therefore, A Government Entity May Not Prosecute An Action For Defamation.

In decisions spanning some 58 years, both before and after the decision of this Court in *New York Times Co.* v. *Sullivan*, *supra*, the highest courts of Illinois, Tennessee, and Georgia have held that criticism of government is absolutely privileged under the First Amendment. Therefore, these courts have held, a government entity may not prosecute an action for libel, as the mere prospect of such a suit has a severe chilling effect upon the exercise of the First Amendment right to free expression.

In *City of Chicago* v. *Tribune Co.*, 307 Ill. 595, 139 N.E. 86 28 A.L.R. 368 (1923), Chicago's government brought a libel action against a newspaper for articles which the paper had published concerning the city's precarious financial condition. The trial court sustained the paper's demurrer to the complaint, and the city appealed. The Illinois Supreme Court affirmed.

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free expression, that "the generous standards of *New York Times* v. *Sullivan*" provide an antidote. 622 F.Supp. at 750. The statement, however, was dictum, as the court itself pointed out that the defamation action before it had been brought by a United States senator in his private capacity. *Ibid.*

In its opinion, the court traced the history of criminal prosecutions for libel on government, both in England and in America. Foreshadowing this Court's opinion in *New York Times Co.* v. *Sullivan*, *supra*, 76 U.S. at 273-77, the Illinois court discussed the Sedition Act of 1798, 1 Stat. 596, and the criticisms levelled at it by Jefferson and Madison. The court then observed that the prospect of a civil action for defamation is equally effective, if not more so, to deter criticism of government. The court stated,

> "The fundamental right of freedom of speech is involved in this litigation, and not merely the right of liberty of the press. If this action can be maintained against a newspaper it can be maintained against every private citizen who ventures to criticize the ministers who are temporarily conducting the affairs of his government. Where any person by speech or writing seeks to persuade others to violate existing law or to overthrow by force or other unlawful means the existing government, he may be punished [citations omitted], but all other utterances or publications against the government must be considered absolutely privileged."

City of Chicago v. Tribune Co., *supra*, 139 N.E. at 90.

Earlier in its opinion, the Illinois court pointed out that "no court of last resort in this county has ever held, or even suggested, that prosecutions for libel on government have any place in the American system of jurisprudence." 139 N.E. at 88, quoted with approval in *New York Times Co.* v. *Sullivan*, *supra*, 376 U.S. at 291. It concluded that "every citizen has a right to criticize an inefficient or corrupt government without fear of civil as well as criminal prosecution." 139 N.E. at 90.

The Tennessee Supreme Court relied upon *City of Chicago* v. *Tribune Co.* in *Johnson City* v. *Cowles Communications, Inc.*, 477 S.W.2d 750 (Tenn., 1972). There, a municipal corporation brought a libel action against two magazine publishers, an author, and the author's employer, another publishing company. As in *City of Chicago*, the trial court sustained demurrers to the complaint, and the city appealed. The Tennessee high court, affirming the decision below, held that a civil prosecution for

defamation brought by a government entity is absolutely forbidden under the First Amendment. 477 S.W.2d at 754.

In *Cox Enterprises* v. *Carroll City-County etc.*, 247 Ga. 39, 273 S.E.2d 841, a hospital authority brought a libel action against a newspaper. The trial court denied the newspaper's motion for summary judgment, and the newspaper appealed. The Georgia Supreme Court reversed. Citing *City of Chicago* v. *Tribune Co.* and *New York Times Co.* v. *Sullivan*, both *supra*, the Georgia court, too, held that the First Amendment works as an absolute bar on defamation actions by government entities. 273 S.E.2d at 846.

B. The California Supreme Court Likewise Has Taken The Position That The Mere Prospect Of A Civil Action For Defamation Brought By A Government Entity Has A Severe Chilling Effect Upon The Exercise Of First Amendment Rights, And Has Rejected The Notion That Application Of An Actual Malice Standard Provides Sufficient Protection.

In *City of Long Beach* v. *Bozek*, 31 Cal.3d 527, 183 Cal.Rptr. 86, 645 P.2d 137 (1982), vacated 459 U.S. 1095 (1983), reiterated 33 Cal.3d 727, 190 Cal.Rptr. 918, 661 P.2d 1072 (1983),[4] the California Supreme Court held that a government entity may not maintain an action against a private citizen for malicious prosecution. Such an action, held the court, violates the citizen's right to petition the government guaranteed under both the First Amendment and the California Constitution, article I, § 3. 645 P.2d at 139.

In its opinion, the California court drew an analogy to suits for defamation brought by government entities. It rejected the notion

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[4]This Court granted certiorari, vacated the judgment of the California Supreme Court, and remanded the case to that court "to consider whether its judgment is based upon federal or state constitutional grounds, or both." 459 U.S. at 1095. On remand, the California court certified that its judgment was based upon both, and reiterated its opinion in the entirety. 661 P.2d at 1073.

that such suits might be allowed so long as recovery is conditioned upon proof of actual malice. The court stated,

> "The policy supporting an absolute privilege for criticism of the government is to allow the free communication of ideas, a concept at the core of First Amendment liberties. If the courts were to condone the imposition of civil sanctions, even if only for statements purportedly made with actual malice, a severe chilling effect would result on the legitimate exercise of the right to express beliefs freely when those beliefs appear to be derogatory of the governing authorities."

645 P.2d at 141.

The Ninth Circuit's position that a citizen's First Amendment right to criticize government "does not encompass a guarantee that he will never need to defend his speech in court" (App. A-4), clearly is at odds with the position taken by the highest courts of Illinois, Tennessee, Georgia, and California. In the view of those courts, having to defend his or her speech in court is precisely what a citizen who criticizes government must never fear.

II.

THE DECISION OF THE NINTH CIRCUIT ON THE FIRST AMENDMENT QUESTION RAISED BY PETITIONER IS IN CONFLICT WITH APPLICABLE DECISIONS OF THIS COURT.

A. The Court Of Appeals Has Misapplied The Holding Of This Court In *Calder* v. *Jones*, As Petitioner Here Seeks To Introduce First Amendment Considerations On A Substantive, Not On A Jurisdictional, Level.

In *Calder* v. *Jones*, *supra*, 465 U.S. at 790-791, this Court held that in weighing the various factors for and against the exercise of in personam jurisdiction under a state long-arm statute in a libel action brought against an out-of-state author and editor, the state court may not place First Amendment considerations in the balance so as to tilt it against the exercise of jurisdiction. This

Court stated, "The infusion of such considerations would complicate an already imprecise inquiry. [Citation omitted.]" 465 U.S. at 790. Then citing *New York Times Co.* v. *Sullivan*, *supra*, 376 U.S. 254, and *Gertz* v. *Robert Welch, Inc.*, 418 U.S. 323, 41 L.Ed.2d 789, 94 S.Ct. 2297 (1974), this Court went on to say,

> "Moreover, the potential chill on protected First Amendment activity stemming from libel and defamation actions is already taken into account in the constitutional limitations on the substantive law governing such suits. [Citations omitted.] To reintroduce those concerns at the jurisdictional stage would be a form of double counting."

Calder, 465 U.S. at 790.

The Ninth Circuit has misapplied *Calder* to this case. Here, petitioner's First Amendment claim — i.e., that the prosecution by respondent Board of Education and by respondent Kopf, in her official capacity as the Board's president, of a civil action against petitioner for defamation violated his right to free expression — constitutes the very substance of his complaint. The claim is not operative on a level antecedent to consideration of the complaint's internal sufficiency. In its opinion, the Ninth Circuit recognized the difference. ("Although we are not engaged in a jurisdictional analysis, . . ." App. A-4.) But its conclusion that *Calder's* reasoning nonetheless applies here is misplaced, especially in light of this Court's clearly expressed position regarding defamation actions by government entities.

B. This Court Has Consistently Taken The Position That The First Amendment Prohibits The Prosecution Of Defamation Actions By Government Entities.

In *New York Times Co.* v. *Sullivan*, *supra*, 376 U.S. at 288-292, this Court also held that in an action brought by a public official for an allegedly defamatory statement which on its face is an impersonal attack, not upon the official, but rather upon the government entity for which he or she was responsible, the official may not recover without sufficient evidence that the statement was in fact made about him or her.

More precisely, this Court held that to link the official to the subject matter of the statement solely on the basis that he or she was responsible for the government entity attacked in the statement is "constitutionally insufficient." 376 U.S. at 291. Such an evidentiary course, explained the Court, "has disquieting implications for criticism of governmental conduct." *Ibid.* Quoting from *City of Chicago* v. *Tribune Co.*, *supra*, 139 N.E. at 88, the Court stated, "For good reason, 'no court of last resort in this country has ever held, or even suggested, that prosecutions for libel on government have any place in the American system of jurisprudence.' " *Ibid.*

This principle was reiterated in *Rosenblatt* v. *Baer*, 383 U.S. 75, 79-81, 15 L.Ed.2d 597, 86 S.Ct. 669 (1966). There, this Court, relying on *New York Times*, disapproved on constitutional grounds an evidentiary presumption that an allegedly defamatory statement made about a government entity was made about the official in charge. The court emphasized that to allow such a presumption is "to invite the specter of prosecutions for libel on government, which the Constitution does not tolerate in any form." 383 U.S. at 81.

And so, far from holding that a the actual malice standard of *New York Times* provides sufficient constitutional protection as against a defamation action brought by a government entity, this Court has consistently taken the position that such an action, by reason of the First Amendment, may not be brought in the first place.

III.

ALTERNATIVELY, THE NINTH CIRCUIT HAS DECIDED A QUESTION OF CONSTITUTIONAL LAW WHICH HAS NOT BEEN, BUT SHOULD BE, SETTLED BY THIS COURT.

A. As The Decision Of The Ninth Circuit Opens The Way To Defamation Actions By Government Entities, Petitioner's First Amendment Claim Presents A Serious And Important Question.

Whether the First Amendment prohibits a local school board and its president, the latter acting in his or her official capacity, from prosecuting a civil action against a private citizen for defamation is a question which this Court should consider on certiorari in this case. It is a serious and important question. It is of more than scholarly interest, and its resolution will benefit not alone the parties to this case. See *Rice* v. *Sioux City Cemetery*, 349 U.S. 70, 74, 99 L.Ed. 897, 75 S.Ct. 614 (1955).

As petitioner has pointed out, the highest courts of four states are of the view that the mere prospect of a defamation action by a government entity works a severe chill upon the exercise of First Amendment rights. *City of Chicago* v. *Tribune Co.*, *supra*, 139 N.E. at 90; *Johnson City* v. *Cowles Communications, Inc.*, *supra*, 477 S.W.2d at 754; *Cox Enterprises* v. *Carroll City-County etc.*, *supra*, 273 S.E.2d at 846; *City of Long Beach* v. *Bozek*, *supra*, 31 Cal.3d at 532-534. Indeed, in all other reported decisions in which the question has been squarely presented, courts have held that the First Amendment serves as an absolute bar to defamation actions by government entities. See *Edgartown Police Patrolmen's Ass'n* v. *Johnson*, 522 F.Supp. 1149, 1152 (D.Mass., 1981); *City of Philadelphia* v. *Washington Post Co.*, 482 F.Supp. 897, 899, (E.D.Penn., 1979); *Weymouth Tp. Bd. of Ed.* v. *Wolf*, 178 N.J.Super. 481, 429 A.2d 431, 432 (1981); *Aluminum Co. of America* v. *City of Lafayette*, 412 N.E.2d 312, 314 (Ind.App., 1980); *Village of Grafton* v. *American Broadcasting*, 70 Ohio App.2d 205, 435 N.E.2d 1131, 1133-1136 (1980); *Capital Dist., etc. v. Northeastern Harness, 92 N.Y. Misc.2d 232, 399 N.Y. Supp. 2d 597, 598 (1977)*; *City of Albany* v. *Meyer*, 99 Cal.App. 651, 279 P. 213, 215 (1929). Cf. *McClatchy* v. *Laxalt*, *supra*, 622 F.Supp. at 750 (dictum).

The decision of the Court of Appeals in this case is the first to hold that the *New York Times* actual malice standard provides sufficient protection as against a defamation action by a government entity. The premise underlying the Ninth Circuit's holding is that a government entity *may* bring a defamation action against a private citizen. This decision now opens the way. Because of this decision, citizens who in the past have not hesitated to criticize government in the most robust fashions might in the future

carefully circumscribe their remarks or, what is more frightening, not speak out at all.

B. Only In Decisions Preceding *Calder* v. *Jones*, And Only In Dicta, Has This Court Expressed Its View That The First Amendment Prohibits Defamation Actions By Government Entities.

While, as noted above, this Court has expressed its view that the First Amendment does not permit a government entity to prosecute an action for defamation (*New York Times Co.* v. *Sullivan*, *supra*, 376 U.S. at 291; *Rosenblatt* v. *Baer*, *supra*, 383 U.S. at 79-91), the decisions in which this Court expressed its view did not themselves concern defamation actions by government entities or by public officers in their official capacities. Also, these decisions antedate that in *Calder* v. *Jones*, *supra*, 465 U.S. 783, on which the Ninth Circuit has relied in this case.

A question which once was thought settled, has now been unsettled by the decision of the Ninth Circuit. This Court should grant certiorari in order to resolve the question definitively.

IV.

IN HOLDING THAT PETITIONER FAILED ADEQUATELY TO ALLEGE THAT RESPONDENTS ACTED UNDER COLOR OF STATE LAW, AND THUS FAILED TO STATE A CLAIM UNDER 42 U.S.C. § 1983, THE NINTH CIRCUIT HAS SO FAR DEPARTED FROM THE ACCEPTABLE AND USUAL COURSE OF JUDICIAL PROCEEDINGS AS TO CALL FOR THE EXERCISE OF THIS COURT'S SUPERVISION.

A. For Purposes Of Passing Upon A Rule 12(b)(6) Motion To Dismiss, Petitioner's Allegation That Respondents Brought A Defamation Action Against Him Pursuant To The Statutes Of The State Of California And The Ordinances, Resolutions, Regulations, Customs, Usages, And Policies Of Respondent Board Of Education, Suffices As An Allegation Of Activity Under Color Of State Law.

It is elementary that to state a claim under § 1983, a plaintiff must allege the violation of a right secured by the Constitution or laws of the United States, and that the one who committed the alleged violation acted under color of state law. *West* v. *Atkins*, 487 U.S. 42, 43, 101 L.Ed.2d 40, 198 S.Ct. 2250 (1988). Indeed, these are the only two allegations required to state a claim under § 1983. *Gonzalez* v. *Toledo*, 446 U.S. 635, 640, 64 L.Ed.2d 572, 100 S.Ct. 1920 (1980).

For purposes of a § 1983 claim, "state law" includes an ordinance or regulation of a local govenment entity, as well as a decision officially adopted or a custom followed by it. *Monell* v. *New York City Dept. of Social Services*, 436 U.S. 568, 690, 56 L.Ed.2d 611, 98 S.Ct. 2018 (1978).

It is elementary as well that in passing upon a Federal Rule of Civil Procedure 12(b)(6) motion to dismiss for failure to state a claim, a court must construe the complaint favorably to the pleader. *Scheuer* v. *Rhodes*, 416 U.S. 232, 236, 40 L.Ed.2d 90, 94 S.Ct. 1683 (1974). "The issue is not whether a plaintiff will ultimately prevail but whether the claimant is entitled to offer evidence to support the claim." *Ibid.* Moreover, a complaint need state only ultimate facts. *McAllister* v. *Kuhn*, 96 U.S. 87, 89, 24 L.Ed. 615 (1878).

In his complaint, petitioner has alleged that respondents acted 'pursuant to the statutes of the State of California, and to the ordinances, resolutions, regulations, customs, usages, and policies of the aforesaid San Francisco Unified School District, ..." App. A-9. Given the above principles, for the Ninth Circuit to have held that petitioner's § 1983 claim must fail becuase petitioner has not alleged a particular ordinance or custom, is to depart so far from the acceptable and usual course of judicial proceedings as to call for the exercise of this Court's supervision.

B. In Alleging That Respondent Board of Education and Respondent Kopf, Acting In Her Capacity As Board Of President, Undertook To Sue Him For Defamation, Petitioner Has Sufficiently Alleged An Official Policy Of Respondent Board For § 1983 "Color Of Law" Purposes.

In *Pembaur* v. *Cincinnati*, 475 U.S. 469, 480-481, 89 L.Ed.2d 452, 106 S.Ct. 1292 (1985), this Court held that for purposes of a § 1983 claim, a course of action represents official local government policy, and thus is deemed to have been performed under color of state law, where the decision to follow the course of action was made by one authorized to make it, whether or not the decision is in writing, and whether it is meant for general application in the future or only for a single occasion.

In his complaint, petitioner alleges that respondent Kopf was president of respondent Board of Education, and that in bringing the defamation action against him, she acted in her capacity as such. App. A-8-9. Petitioner also alleges that respondent Board itself joined in bringing the action. App. A-9.

Given the holding in *Pembaur*, and under the favorable reading to which the complaint in this case is entitled (*Scheuer* v. *Rhodes*, *supra*, 416 U.S. at 236), petitioner clearly has alleged an official policy of respondent Board and, hence, activity undertaken under color of state law. For this reason as well, the holding of the Ninth Circuit regarding the sufficiency of petitioner's color of law allegation is a far departure from the acceptable and usual course of judicial proceedings.

CONCLUSION

A writ of certiorari should issue, since the decision of the Ninth Circuit conflicts with decisions of courts of last resort of four states and with applicable decisions of this Court. Alternatively, should decisions of this Court be interpreted as to leave the First Amendment question raised by petitioner unsettled, this Court should grant certiorari to review and settle the question. The question is serious and important; the Ninth Circuit's decision now opens the way to civil defamation actions by govenment

entities, which, prior to the Ninth Circuit's decision, were uniformly discountenanced on Constitutional grounds.

A writ of certiorari also should issue so that this Court may review and correct the holding of the Ninth Circuit with respect to the sufficiency of petitioner's § 1983 color of law allegations, a holding by which the Ninth Circuit has so far departed from the acceptable and usual course of judicial proceedings as to call for the exercise of this Court's supervision.

Respectfully Submitted,

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Dated April 15, 1991

APPENDIX

FOR PUBLICATION

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

ANTON JUNGHERR,
Plaintiff-Appellant,
v.
SAN FRANCISCO U.S.D. BOARD OF EDUCATION, and MYRA KOPF, former president of the Board,
Defendants-Appellees.

No. 89-15364
D.C. No. CV-88-3612-WWS
OPINION

Appeal from the United States District Court
for the Northern District of California
William W. Schwarzer, District Judge, Presiding

Argued and Submitted
December 10, 1990 — Pasadena, California

Filed January 17, 1991

Before: Procter Hug, Jr., Robert R. Beezer and Melvin Brunetti, Circuit Judges.

Opinion by Judge Brunetti

SUMMARY

Constitutional Law

Affirming a district court dismissal of a complaint for failure to state a claim for relief, the court of appeals held that a defamation action brought by a school board president against an individual did not give rise to a section 1983 action by the individual.

A school board president filed a defamation action against appellant Anton Jungherr in California Superior Court for statements Jungherr made at a public meeting of the board about the president's handling of board business. Jungherr was granted his motion for summary judgment. Subsequently, Jungherr filed a section 1983 action against the school board and its president in district court. The district court dismissed Jungherr's complaint for failure to state a claim upon which relief could be granted.

[1] The court disagreed that the defamation action gave rise to a section 1983 action. Jungherr did not point to a statute, ordinance, regulation, custom, or usage that subjected him to the alleged deprivation of his first and fourteenth amendment rights. [2] Jungherr was free to exercise his first amendment right. The *New York Times* requirement that a plaintiff must show actual malice on the part of a libel or defamation defendant protected Jungherr's speech in this instance because it led to a summary judgment in his favor rather than forcing him to endure protracted litigation. Accordingly, the district court properly granted the board's motion to dismiss.

COUNSEL

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Randy Riddle and Karen B. Konigsberg, Deputy City Attorneys, San Francisco, California, for the defendant-appellee.

BRUNETTI, Circuit Judge:

On October 7, 1986, Myra Kopf ("Kopf"), as President of the Board of Education of the San Francisco Unified School District ("Board"), filed a defamation action against Appellant Anton Jungherr ("Jungherr") in California Superior Court. That action arose out of statements Jungherr made at a public meeting of the Board about Kopf's handling of board of business. Jungherr was granted a motion for summary judgment on March 4, 1987.

On September 13, 1988, Jungherr filed an action in the United States District Court under 42 U.S.C. Section 1983, against the Board and Kopf, for acts performed pursuant to her authority as Board President. Jungherr's complaint alleged that 1) Kopf acted under authority of her office as president of the board in bringing a defamation action against Jungherr; 2) Jungherr made statements at a public meeting regarding Kopf's handling of certain board business; and 3) filing the defamation action deprived Jungherr of his first amendment right to freedom of speech and his fourteenth amendment right to equal protection. Jungherr claimed that as a result of Kopf's official acts, he incurred and should recover for attorney's fees in the sum of $28,371.25 and emotional and physical distress of an unspecified amount. Jungherr also asserted punitive damages in the sum of $1,250,000. The district court dismissed Jungherr's complaint, with prejudice, under Fed. R. Civ. P. 12(b)(6), for failure to state a claim for which relief can be granted. Jungherr appeals this dismissal.

DISCUSSION

[1] Jungherr contends that Kopf's defamation action, brought in her capacity as President of the Board, gives rise to a section 1983 action. We disagree. Section 1983 provides in pertinent part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . subjects, or causes to be subjected, any citizen of the United States . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

Jungherr does not point to a statute, ordinance, regulation, custom, or usage that subjected him to the alleged deprivation of his first and fourteenth amendment rights. Instead, Jungherr notes that a libel action by a government entity has never been upheld. *New York Times Co.* v. *Sullivan*, 376 U.S. 254. 291 (1964). Because it is virtually impossible for a government entity to prevail on a defamation action, Jungherr argues that merely bringing such an action infringes the defendant's first and fourteenth amendment rights. He alleges this is so, not because the

action precludes the defendant from speaking, but because the defendant is forced to endure the burden and expense of defending himself in court for speaking.

Although the precise issue of whether a defamation suit brought by a governmental entity gives rise to a section 1983 action has not been addressed, cases in our circuit and the Supreme Court give us some guidance. In *Calder* v. *Jones*, 465 U.S. 783 (1984), Jones brought a libel action against Calder in California state court, and the Supreme Court addressed whether first amendment concerns should enter into a personal jurisdiction analysis. The apparent contention by the petitioner in *Calder* was that the possible burden on first amendment interests should weigh against an assertion of personal jurisdiction. Rejecting this contention, *Calder* held:

> [T]he potential chill on protected First Amendment activity stemming from libel and defamation actions is already taken into account in the constitutional limitations on the substantive law governing such suits. See *New York Times Co.* v. *Sullivan*, 367 [*sic*, 376] U.S. 254 (1964); *Gertz* v. *Robert Welch, Inc.*, 418 U.S. 323 (1974). To reintroduce those concerns at the jurisdictional stage would be a form of double counting. We have already declined in other contexts to grant special procedural protections to defendants in libel and defamation actions in addition to the constitutional protections embodied in the substantive laws.

Calder v. *Jones*, 465 U.S. 783, 790-91 (1984).

[2] Although we are not engaged in a jurisdictional analysis. *Calder's* reasoning applies here. Jungherr, like the petitioner in *Calder*, is free to exercise his first amendment right. That right, however, does not encompass a guarantee that he will never need to defend the speech in court. Once in court, however, any libel or defamation challenge to the exercise of the first amendment right must satisfy the strict *New York Times* standard. The *New York Times* requirement that the plaintiff must show actual malice on the part of a libel or defamation defendant protected Jungherr's speech in this instance because it lead [*sic*] to a summary

judgment in his favor rather than forcing him to endure protracted litigation. *See New York Times*, 376 U.S. at 283.

Further guidance on this issue is provided by *Laxalt* v. *McClatchy*, 622 F.Supp. 737 (D.C. Nev. 1985). Relying on *Calder*, *Laxalt* held that a newspaper, sued for libel by a United States Senator, could not counterclaim for alleged violations of its first amendment rights. *Laxalt*, 622 F.Supp. at 743. *Laxalt* correctly stated

> In this case, it is clear that the filing of a libel action cannot be considered to "chill" first amendmen rights. As in *Calder*, the defendants' protection from any potential first amendment damage lies in the standards of *New York Times* and not in a first amendment *Bivens* action. To permit defendants to bring this counterclaim would be to allow exactly the form of "double counting" which the Court decried in *Calder*.

Id. at 751. Accordingly, the district court correctly granted Kopf's motion to dismiss. Given our disposition on this issue, we need not address other issues raised by Jungherr.

AFFIRMED.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

ANTON JUNGHERR,
Plaintiff,

vs.

BOARD OF EDUCATION OF THE SAN FRANCISCO UNIFIED SCHOOL DISTRICT and MYRA KOPF,
Defendants.

No. C-88-3612-WWS
ORDER

Plaintiff Anton Jungherr filed this action pursuant to 42 U.S.C. section 1983, against the Board of Education of the San Francisco Unified School District ("Board") and former president of the Board, Myra Kopf. Defendants now move to dismiss.

According to the complaint, while Kopf was campaigning for re-election to the Board, at an open meeting of the Board, Jungherr made statements critical of Kopf and the Board.[1] Kopf, in her capacity as president of the Board, filed a state court defamation action against Jungherr based on these statements. Summary judgment was entered for Jungherr in the defamation action. Jungherr then brought this action to recover his defense costs and punitive damages. He alleges that defendants' actions under color of state law chilled the exercise of his first amendment rights.

Defendants move to dismiss on the grounds of sovereign immunity, qualified immunity, and failure to state a substantive claim upon which relief may be granted. Because the complaint fails to state a claim, the Court does not reach the immunity issues.

---

[1] Neither Jungherr nor defendants say what the statements were.

To state a claim under section 1983, Jungherr must show that defendants violated one of his federal rights while acting under color of state law. Defendants contend that the filing of a defamation action by a public official in her official capacity does not infringe Jungherr's first amendment rights because those rights are "amply protected by the defamation standard established in *New York Times* v. *Sullivan*," 376 U.S. 254 (1964). (Opposition, p. 15.)

A citizen's right to criticize his government is at the heart of the first amendment. *E.g., New York Times* v. *Sullivan*, 376 U.S. at 269-70. The threat of a defamation action by a "public official may be as chilling to the exercise of First Amendment freedoms as fear of the outcome of the lawsuit itself." *Washington Post* v. *Keogh*, 365 F.2d 965, 968 (D.C. Cir. 1966) (granting summary judgment on defamation claim), *cert. denied*, 385 U.S. 1011 (1967). However, "the potential chill on protected First Amendment activity stemming from libel and defamation actions is already taken into account in the constitutional limitations on the substantive law governing such suits." *Calder* v. *Jones*, 465 U.S. 783, 790 (1984) (citing *New York Times* and *Gertz* v. *Robert Welch, Inc.*, 418 U.S. 323 (1974)). Therefore, the filing of the defamation action did not infringe Jungherr's federal rights.

The complaint is dismissed with prejudice.

IT IS SO ORDERED.

DATED: February 13, 1989

WILLIAM W SCHWARZER
United States District Judge

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

ANTON JUNGHERR,
Plaintiff.

v.

BOARD OF EDUCATION OF THE SAN FRANCISCO UNIFIED SCHOOL DISTRICT, and MYRA KOPF
Defendants.

D.C. No. C-88-3612-WWS
Complaint for Damages (Civil Rights)

Filed Sept. 13, 1988.

Plaintiff alleges:

I

Defendant Board of Education of the San Francisco Unified School District (hereinafter "Board of Education") is, and at all times hereinafter mentioned was, the duly constituted and acting governing board of the San Francisco Unified School District of the City and County of San Francisco, State of California, a school district duly organized and existing under and by virtue of the laws of the State of California. Under the provisions of Section 35162 of the California Education Code, defendant Board of Education may sue and be sued.

II

Defendant Myra Kopf is, and at all times hereinafter mentioned was, a resident of the aforesaid City and County of San Francisco. At all times hereinafter mentioned, defendant Myra Kopf was the duly elected, qualified, and acting President of her co-defendant Board of Education. Each and every act of defendant Myra Kopf described hereinafter was undertaken or per-

formed, or was caused to have been undertaken or performed, by her by virtue and under the authority of her office as President of her co-defendant Board of Education.

III

This action arises under the Constitution of the United States, more particularly, under the provisions of the First and Fourteenth Amendments thereto, and under the laws of the United States, more particularly, under the provisions of Title 42 of the United States Code, Section 1983.

IV

This court has jurisdiction of this action under the provisions of Title 28 of the United States Code, Section 1331.

V

On or about September 17, 1986, during that period of time in which defendant Myra Kopf was declared candidate for reelection to her co-defendant Board of Education in the general election held in the aforesaid City and County of San Francisco on November 4, 1986, plaintiff, at a public meeting of defendant Board of Education, made statements and comments regarding the transaction by defendant Myra Kopf of certain business of her co-defendant Board of Education.

VI

Thereafter, on October 7, 1986, defendants, and each of them, acting pursuant to the statutes of the State of California, and to the ordinances, resolutions, regulations, customs, usages, and policies of the aforesaid San Francisco Unified School District, commenced an action against plaintiff in the Superior Court of the State of California in and for the City and County of San Francisco, which action was styled *Myra Kopf, as President of the San Francisco Unified School District's Board of Education*, vs. *Anton Jungherr*, No. 865176, and which action was for defama-

tion by reason and on the basis of plaintiff's statements and comments described hereinabove.

VII

On March 4, 1987, after hearing on a motion for summary judgment made in the said action for defamation by plaintiff, therein the defendant, the aforesaid superior court entered judgment in his favor.

VIII

Such conduct of defendants, and each of them, deprived plaintiff of rights, privileges, and immunities secured to him by the Constitution of the United States, namely, the right to freedom of speech secured to him by the First Amendment, and the right not to be deprived of life, liberty, or property without due process of law, and the right to the equal protection of the laws, secured to him by the Fourteenth Amendment to the Constitution.

IX

As a direct consequence and result of the conduct of defendants, and each of them, as described hereinabove, plaintiff was required to and did employ the services of attorneys in the defense of the said action for defamation, and incurred expenses for such services, all to his damage in the sum of $28,371.25.

X

As a further direct consequence and result of the conduct of defendant, and each of them, as described hereinabove, plaintiff suffered severe emotional and physical distress, and was injured in mind and body, all to his damage in a sum according to proof.

XI

The conduct of defendant Myra Kopf, as aforesaid, was undertaken wilfully and with callous and reckless indifference to and

disregard of plaintiff's rights under the First and Fourteenth Amendments to the Constitution of the United States, as described hereinabove, and with the purpose and intent of punishing and amercing plaintiff for his having made the statements and comments described hereinabove in the exercise of the right to freedom of speech secured to him by the First Amendment to the Constitution, and with the purpose and intent of causing plaintiff to refrain from making further statements and comments in the exercise of such right and regarding the transaction by defendant Myra Kopf of certain business of here co-defendant Board of Education during that period of time in which she was a declared candidate for re-election thereto in the general election held in the aforesaid City and County of San Francisco on November 4, 1986. Plaintiff is therefore entitled to an award of exemplary and punitive damages in the sum of $1,250,000.

WHEREFORE, plaintiff demands judgment:

1. Awarding plaintiff actual damages in a sum according to proof;

2. Awarding plaintiff punitive damages in the sum of $1,250,000;

3. Awarding plaintiff reasonable costs and expenses of this action; and

4. Granting plaintiff such other and further relief as may be just.

JACOBS, SPOTSWOOD,
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Attorneys for Plaintiff

Supreme Court, U.S.
FILED
JUL 1 1991
OFFICE OF THE CLERK

No. 90-1612

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1990

ANTON JUNGHERR,
Petitioner,

VS.

SAN FRANCISCO UNIFIED SCHOOL DISTRICT BOARD OF EDUCATION, and MYRA KOPF, former President of the Board,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the Ninth Circuit properly refused to create a constitutional tort of malicious prosecution against a public official who brought an unsuccessful libel action to redress accusations of criminal misconduct.

2. Whether the Ninth Circuit correctly determined that a public official who files a defamation suit for damages to her reputation does not exercise state power under color of law for purposes of 42 U.S.C. § 1983.

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New York Times Co. v. Sullivan, 376 U.S. 254 (1964) 4, 5, 6, 7, 8, 12
Paul v. Davis, 424 U.S. 693 (1976) 11
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Screws v. United States, 325 U.S. 91 (1945) 9, 11
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No. 90-1612

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1990

ANTON JUNGHERR,
Petitioner,

VS.

SAN FRANCISCO UNIFIED SCHOOL DISTRICT
BOARD OF EDUCATION, and MYRA KOPF,
former President of the Board,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF IN OPPOSITION

Respondents respectfully request that this Court deny the Petition for Writ of Certiorari filed by petitioner Anton Jungherr.

STATEMENT OF THE CASE

In October 1986, Myra Kopf, then president of the Board of Education of the San Francisco Unified School District ("SFUSD"), sued Anton Jungherr for defamation and intentional infliction of emotional distress. Kopf sought damages for harm done to her reputation by Jungherr's oral and written statements charging her with misconduct in the performance of her duties. Specifically, Jungherr accused Kopf of directing the District's business to a certain company in exchange for campaign contributions.

After Jungherr prevailed against the defamation action in state court, he countersued Kopf in federal court and named the Board of the SFUSD as a co-defendant. Jungherr sought to recover his litigation costs and other damages arising out of his defense of Kopf's lawsuit. The complaint, which alleged a single cause of action under 42 U.S.C. § 1983, was dismissed for failure to state a claim. The District Court and the Ninth Circuit Court of Appeals declined to establish a constitutional tort for what was essentially an allegation of malicious prosecution against Kopf. Finding no state action—Jungherr's federal complaint did not even allege that Kopf had acted under color of law—the appellate court held that the First Amendment adequately protects criticism of a public official by erecting a substantial burden of proof against any defamation recovery.

Jungherr's petition to this Court attempts to manufacture a false conflict between the holdings of the lower courts in this case and the general principle that government cannot recover damages for libel. Jungherr argues that the Civil Rights Act must provide redress against a public entity that sues a critic of government in defiance of this well-established principle. Jungherr's argument, however, rests on a patently false account of the original defamation action and the proceedings below. Simply put, this case is not about libel against the government; it is about an alleged libel against a public official. Jungherr accused Kopf of a serious crime, and such an accusation is an appropriate basis for a defamation action by a public official. Kopf was unsuccessful, but the fact that she failed to recover damages for harm to her reputation does not transform her lawsuit into a libel action by the state to punish criticism of government.

Jungherr's claim that he was sued for a libel against government is a recent invention that finds no support in his federal complaint. Jungherr alleged that he "made statements and comments regarding the transaction by defendant Myra Kopf of certain business of her co-defendant Board of Education." (Pet. App. at A-9, ¶ V.) No other person or entity is identified as the subject of his remarks. Finding these comments false and offensive, Kopf filed a lawsuit in the Superior Court for the City and County of San Francisco seeking damages against Jungherr for

defamation. (Pet. App. at A-9, ¶ VI.) Acknowledging that her position as a public official dictated the standard of proof for such an action, Kopf styled her complaint as *Myra Kopf, as President of the San Francisco Unified School District's Board of Education vs. Anton Jungherr*, No. 865-176. (Pet. App. at A-9, ¶ VI.) Kopf did not allege that she was acting for the SFUSD or any other person by filing the action; she sought damages only for harm done to her reputation by the alleged defamation.

Jungherr's federal complaint reflects the personal nature of Kopf's defamation action. Jungherr conceded that the Board of the SFUSD may sue and be sued as a public entity under California law (Pet. App. at A-8, ¶ I), yet Jungherr never alleged that the SFUSD was a party to the defamation action. Jungherr correctly stated that Kopf was the only plaintiff and that his alleged defamation was directed only at her. (Pet. App. at A-9, ¶¶ V-VI.) Jungherr's complaint did not state that Kopf acted under color of law when she sued Jungherr. His complaint only alleged that Kopf's actions were performed or "[were] caused to have been undertaken or performed by virtue and under the authority of her office as President of her co-defendant Board of Education." (Pet. App. A-9, ¶ 11.) This statement, however, does no more than assert that Kopf was performing her official duties when she committed the alleged misconduct that was the subject of Jungherr's accusations. Not only were Jungherr's remarks directed at Kopf individually, Kopf's motivation for filing the libel action was entirely personal. The purpose of her lawsuit, Jungherr alleged, was to cause him to refrain from making further comments about Kopf while she was a "declared candidate for re-election." (Pet. App. at A-11, ¶ XI.)

In summary, Jungherr's comments were directed at Kopf for what he believed was her criminal misconduct in the transaction of business for the SFUSD. Jungherr did not make, nor did Kopf file an action against him for, defamatory comments about the Board or the SFUSD. In Jungherr's complaint, Kopf's role as a public official is limited only to the allegations that she had abused her office in transacting business and that she intended to silence his criticism during an election year. Jungherr did not allege that Kopf was authorized to bring a libel suit on behalf of

the SFUSD, for such an allegation would have been contrary to state law. Instead, Jungherr's federal complaint sought damages arising only out of his defense of a defamation action brought by a public official for libelous remarks directed, by name, at that public official.

In its order below, the District Court recognized that this Court has permitted public officials to recover damages for defamatory attacks on the performance of official duties if the evidence satisfies the standards of *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964). The First Amendment provides sufficient protection for free speech, the District Court determined, in the burden of proof a public official must satisfy under *New York Times* in order to prevail in a defamation suit.

In upholding the District Court's decision, the Ninth Circuit noted that Jungherr had failed to identify the manner in which Kopf acted under color of law when she sued Jungherr for damage done to her reputation. *Jungherr v. San Francisco Unified School Dist.*, 923 F.2d 743, 744 (9th Cir. 1991). Even if there were a basis for an allegation that Kopf acted under color of law, the Ninth Circuit determined that the standards of *New York Times* insulated a critic's speech from the chill entailed by facing a defamation action. Drawing on *Calder v. Jones*, 465 U.S. 783 (1984), the appeals court refused to give a "double" obeisance to free speech: first, through the imposition on the public official plaintiff of a heavy burden of proof, and second, through the creation of a special federal right to recover damages against an unsuccessful plaintiff. *Jungherr*, 923 F.2d at 743.

The Ninth Circuit's opinion is in accord with this Court's leading decisions on defamation actions by public officials. A public official may file a lawsuit for personally libelous remarks regarding his conduct of business, and the decision to file such a suit—no matter how frivolous the action—has never been held to give rise to a correlative constitutional claim. To the contrary, this Court has held that the mere filing of a state claim does not give rise to federal damages against the responsible public official. The opinion is also consistent with this Court's regularly expressed reluctance to create constitutional torts for what are essentially private wrongs. Jungherr not only failed to identify any state

action as the moving force behind Kopf's lawsuit, he made no showing that state law remedies were insufficient to recover his litigation costs. Therefore, the Ninth Circuit's decision presents no conflict with the well-established privilege for criticism of a public entity, and the case does not warrant review by this Court.

I

THE NINTH CIRCUIT'S DECISION IS CONSISTENT WITH THE GENERAL PRINCIPLE THAT A PUBLIC ENTITY MAY NOT RECOVER DAMAGES FOR DEFAMATION.

In his petition, Jungherr argues that the Ninth Circuit has held that a government entity may recover damages in an action for defamation against a government critic. Jungherr maintains that this holding is contrary to *New York Times v. Sullivan* as well as the decisions of three state supreme courts. Alternatively, Jungherr maintains that this Court should review this case in order to resolve the question of whether a government entity may maintain a libel action.

Jungherr's petition rests on a spurious premise. The Ninth Circuit's decision does not intimate a departure from the general principle that a public entity may not recover damages for defamation. The appeals court in the instant case was not presented with a case of a public entity seeking to recover damages for libel. As demonstrated above, Jungherr was the defendant in an action by a public official seeking damages for harm to her reputation alone. The Ninth Circuit simply held that a defendant could not maintain a claim under 42 U.S.C. § 1983 against a public official who filed an unsuccessful defamation action.

A. Petitioner Jungherr Was The Defendant In An Action Brought By A Public Official For Remarks Directed Solely At That Official; Jungherr Was Not Sued For Libel Against The Government.

It has long been established that criticism of a government institution, no matter how false or disparaging, is absolutely

privileged. In *New York Times*, this Court applied this principle to hold that an "impersonal attack on governmental operations" could not constitute an actionable libel of an official responsible for those operations. 376 U.S. at 292. The Court held that a general commentary on the treatment of certain persons by the police in Alabama could not constitutionally support a defamation action by a police commissioner who was never identified in the disparaging remarks. Because "there was no other evidence to connect the statements with" the police commissioner, the statements were absolutely protected as criticism of governmental operations. *Id.*

By contrast, the instant case presents not an "impersonal attack on government" but a direct accusation of illegal conduct committed by a particular, named public official. Jungherr's allegations against Kopf are similar to those at issue in *Coleman v. MacLenan*, 78 Kan. 711, 98 P. 281 (1908), a decision that formed the basis of the "actual malice" standard set forth in *New York Times*. In *Coleman*, the plaintiff, the state attorney general and a candidate for re-election, was charged by a newspaper with mismanagement in connection with a school-fund transaction. The Kansas Supreme Court held that the plaintiff could recover damages for defamation if he established actual malice. This Court expressly approved this approach in *New York Times*. A public official may recover damages for libelous statements directed at his official conduct, but only if he can establish actual malice. *New York Times*, 376 U.S. at 281. This was exactly the theory of Kopf's lawsuit against Jungherr.

B. Because Jungherr's Allegedly Libelous Remarks Were Directed At An Individual Official, The Ninth Circuit's Holding Does Not Contradict Those Decisions That Accord An Absolute Privilege To Criticism Of Government Institutions.

As noted above, Jungherr's direct accusation that Kopf had engaged in improper and criminal behavior is a far cry from the attenuated, virtually imperceptible allusion to a police commissioner condemned as constitutionally insufficient in *New York Times*. The highly personal nature of Jungherr's alleged defamation also distinguishes the instant case from those holdings cited

in the petition for the proposition that libel does not run against the government. In each case cited by petitioner, the allegedly libelous remarks were impersonal comments regarding a government institution, and the institution itself sought damages for harm done to its reputation.

In *City of Chicago v. Tribune Co.*, 307 Ill. 595, 139 N.E. 86 (1923), the government of Chicago was the plaintiff in a libel action against a defendant newspaper that published articles about the city's financial condition. No individual officials were identified or allegedly harmed by the stories. The only alleged injury was to the City's credit and financial standing. Similarly, in *Johnson City v. Cowles Communications, Inc.*, 477 S.W.2d 750, 751 (Tenn. 1972), a municipal corporation sued a defendant in connection with an article that depicted the city as "fascist." No individual official sought damages to his or her reputation. In *Cox Enterprises v. Carroll City-County Hosp. Auth.*, 247 Ga. 39, 273 S.E.2d 841 (1981), a hospital authority brought a libel action against a newspaper for a story criticizing the authority's operations. The remarks were held absolutely privileged; they did not refer to or identify specific individuals.

Petitioner cites these three holdings as well as dictum in the *City of Long Beach v. Bozek*, 31 Cal.3d 527 (1982), *vacated*, 459 U.S. 1095, *reinstated*, 33 Cal.3d 727 (1983), for the undisputed principle that remarks critical of government cannot form the basis for a libel action by government. The instant case, however, concerns libelous remarks directed at a public official, not at a government entity. The plaintiff in the original lawsuit was not government but an individual public official. As this Court held in *New York Times*, the absolute privilege for criticism of government does not immunize a speaker who directs libelous remarks at a particular public official, even if those remarks concern the conduct of official business.

Petitioner failed to disclose that the courts of the states allegedly in conflict with the Ninth Circuit have permitted a public official to recover damages for libelous remarks directed at the discharge of official duties. For example, in *Catalano v. Pechous*, 83 Ill.2d 146, 419 W.E.2d 350 (1980), *cert. denied*, 451 U.S. 911 (1981), the defendant allegedly made statements at a meeting of

a city council implying that several aldermen had been bribed by a company doing business with the city. The Illinois Supreme Court upheld a summary judgment in favor of the public officials under the standards of *New York Times* and its progeny. Both the Tennessee and Georgia supreme courts also permit public officials to maintain libel actions for defamatory remarks directed at their official conduct. *See Cox Enterprises*, 273 S.E.2d at 843 n.2; *Press, Inc. v. Verran*, 569 S.W.2d 435, 442 (Tenn. 1978).

In summary, the Ninth Circuit's decision in the instant case does not deviate from the principle that government has no cause of action for a libel against it. Instead, the decision stands only for the rule that the filing of a defamation action by a public official for remarks directed at that official does not give rise to a correlative claim under 42 U.S.C. § 1983 for a constitutional violation. Petitioner's attempt to concoct a conflict in the law must be rejected.

II

IN KEEPING WITH THIS COURT'S PRECEDENTS, THE NINTH CIRCUIT PROPERLY DECLINED TO CREATE A CONSTITUTIONAL BASIS FOR A COUNTERSUIT AGAINST AN UNSUCCESSFUL PLAINTIFF IN A DEFAMATION ACTION.

A. The Filing Of A Defamation Action By A Public Official Does Not Constitute An Act Under Color Of Law.

To maintain his action under 42 U.S.C. § 1983, petitioner was required to allege that his constitutional rights were violated "by a person acting under color of state law." *West v. Atkins*, 487 U.S. 42, 48 (1988). As the Ninth Circuit noted, Jungherr failed to make this allegation in his federal complaint. 923 F.2d at 745. This was not simply a pleading error that could be corrected by an amendment. Kopf's action asserted a personal right against Jungherr. California's libel law created the cause of action and federal constitutional law dictated the standard of proof. But Kopf's actions in filing the complaint cannot be attributed to the exercise of official state power. *Polk County v. Dodson*, 454 U.S.

312, 321 (1981). Therefore, Jungherr could not maintain a claim under section 1983.

The fact that state law authorizes a defamation action by a public official does not satisfy the requirement of demonstrating that constitutional rights were abridged by an act under color of law. A plaintiff must show that state action is the moving force behind the alleged deprivation. "Misuse of power, possessed by virtue of state law and made possible only because the wrongdoer is clothed with authority of state law, is action taken 'under color of' state law." *United States v. Classic*, 313 U.S. 299, 326 (1941); *Screws v. United States*, 325 U.S. 91, 109 (1945); *Polk County*, 454 U.S. at 317-18; *West*, 487 U.S. at 49. While a defendant's actions need not be lawful to be under color of law, those actions must be related to the powers and duties conferred on the defendant. This Court has recently stated that "generally, a public employee acts under color of state law while acting in his official capacity or while exercising his responsibilities pursuant to state law." *West*, 487 U.S. at 50.

This Court's precedents require that a public officer be "performing official duties" in order for the officer's actions to be taken under color of law. *Screws*, 325 U.S. at 110. In *United States v. Classic*, for instance, plaintiffs alleged that their right to vote in a primary election had been infringed. This Court emphasized that "[t]he alleged acts of appellees were committed in the course of their performance of duties under the Louisiana statute requiring them to count the ballots, to record the result of the count, and to certify the result of the election." 313 U.S. at 325-26. The Court, therefore, held that defendants' actions were taken under color of state law. *Id.* at 326.

Under the standard set forth by this Court, Kopf's filing of a defamation action was not conduct under color of state law within the meaning of section 1983. Kopf's action was not "made possible only because [she was] clothed with authority of state law"; she merely exercised a right common to all citizens. *Classic*, 313 U.S. at 326. No state or local law granted Kopf the authority to bring a defamation action on behalf of the school board by virtue of her position as president. In fact, respondent was without

authority to file *any* lawsuit on behalf of the Board.[1] Initiating lawsuits of any type was simply not one of Kopf's official duties or "responsibilities pursuant to state law." *West*, 487 U.S. at 50. The filing of her defamation suit, therefore, could not be an action taken "in her official capacity." *Id.* As such, the suit cannot be deemed to have been initiated "under color of state law."

Nor can Kopf's private conduct be transformed into action under color of law by virtue of her employment with the school district. In *Polk County v. Dodson*, 454 U.S. at 321, this Court held that a public defender's employment relationship with the state "is insufficient to establish that a public defender acts under color of state law within the meaning of § 1983." The issue in *Polk County* was whether a public defender's decision to withdraw as counsel deprived respondent of his right to effective representation under color of law. In holding that the defender's action could not be attributed to the state, this Court noted that:

> [the] assignment entailed functions and obligations in no way dependent on state authority. From the moment of her appointment, [the attorney] became Dodson's lawyer, and Dodson became [the attorney's] client. Except for the source of payment, their relationship became identical to that existing between any other lawyer and client.

Id. at 318. Central to the Court's analysis was the notion that the public defender's representation of respondent was "essentially a private function . . . for which state office and authority are not needed." *Id.* at 319.

As in *Polk County*, Kopf's filing of a defamation suit was no different than an action taken by any private citizen. The only

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[1] California Education Code § 35161 confers any power granted to a school district by law to the district's governing board. A majority vote of all of the governing board members is required to take any official action. Cal. Educ. Code, §§ 35163, 35164. Noting these provisions and the "fundamental distinction" between a governing board and its individual members, the California Attorney General has stated that only a school board acting as a whole can direct county or private counsel. 70 Ops. Cal. Atty. Gen. 42, 43-44 (1987). An individual board member, acting independently, is without such power. *Id.*

relevance of her public office was that, as a public official, she faced a higher burden in establishing her claim against a libel of her performance of her duties. The filing of the suit was "essentially a private function . . . for which state office and authority [were] not needed." *Polk County*, 454 U.S. at 319. Although Kopf brought the action while she was a public official, she sought to redress harm to her own reputation. The action was clearly "in the ambit of [her] personal pursuits" and therefore excluded from section 1983. *Screws*, 325 U.S. at 110. Petitioner's complaint was properly dismissed.

B. Even If A Public Official's Filing Of A Defamation Suit Could Be Attributed To State Action, This Court's Decisions Fully Support The Ninth Circuit's Refusal To Establish A New Civil Rights Claim.

This Court has repeatedly discouraged the creation of constitutional torts to mirror remedies available at state law. This Court has rejected reasoning that would make the Fourteenth Amendment's application of constitutional rights against the states "a font of tort law to be superimposed upon whatever system may already be administered by the States." *Daniels v. Williams*, 474 U.S. 327, 332 (1986) (quoting *Paul v. Davis*, 424 U.S. 693, 701 (1976)). Jungherr's invitation to create a new constitutional tort, however, proceeds exactly from this improper reasoning.

Because he was compelled to defend what he believes was a meritless action in state court, Jungherr insists that he is entitled to a federal forum for his claim of malicious prosecution against Kopf. This Court has never held that the filing of a lawsuit gives rise to actionable damages. On the contrary, this Court has recognized a broad privilege for civil actions filed by public officials.

In *Butz v. Economou*, 438 U.S. 478 (1978), the plaintiff alleged that a government agency had instituted proceedings against him in retaliation for his criticism of the agency. The initiation of these proceedings allegedly violated the plaintiff's First Amendment rights. This Court held that the "decision to move forward with an administrative proceeding" was entitled to absolute immunity. *Id.* at 516. The "legal remedies available to

the defendant in such a proceeding provide sufficient checks" on the overzealous public official. *Id.*

In the instant case, the Ninth Circuit's decision follows closely the rationale expressed in *Butz*. The appellate court held that the rigorous standards of *New York Times* provide sufficient safeguards against misguided libel suits. The availability of summary judgment if a plaintiff fails to meet these standards protects a defendant from "protracted litigation." 923 F.2d at 745.

In addition to the protections inherent in any libel action by a public official, state law provided Jungherr with specific recourse. California provides a full panoply of damage remedies for malicious prosecution. *See Walsh v. Bronson*, 200 Cal.App.3d 259 (1988). Even if such a claim is unavailable, California courts have broad discretion to award attorneys fees and costs in the initial action. *See City of Long Beach*, 31 Cal.3d at 538 (a plaintiff who could not pursue a malicious prosecution claim can recover litigation expenses).

With respect to the particular claims in the instant case, the Ninth Circuit correctly refrained from fashioning the principles of *New York Times* into a new federal cause of action. In *Calder v Jones*, this Court refused to incorporate these principles into a rule that would limit personal jurisdiction in defamation actions. 465 U.S. at 790-91. Petitioner urges a broader jurisprudential extension than the defendant requested in *Calder*. Petitioner would have the courts recognize a new constitutional tort based on a rarified construction of *New York Times*. This result would be contrary both to the common law privilege accorded lawsuits and this Court's holding that the filing of a lawsuit does not give rise to an actionable claim under section 1983. Petitioner's approach, moreover, offers no limiting principle; any unsuccessful state action could give rise to a federal claim solely on the bare allegation that the initial action was filed in retaliation for criticism of government. The Ninth Circuit's refusal to recognize such claims should not be disturbed.

CONCLUSION

Petitioner Jungherr seeks to induce this Court's review by portraying the instant case as a threat to the absolute privilege to criticize government. That privilege, however, is not at issue. Jungherr prevailed against a libel claim based on accusations of criminal misconduct that he leveled at a particular government official. That official, asserting a right common to all citizens, brought a defamation action against Jungherr for damages done to her reputation. The suit was clearly authorized by this Court's decisions permitting a public official to recover such damages upon showing of actual malice.

In its decision below, the Ninth Circuit held that a public official's filing of an unsuccessful libel suit does not give rise to a violation of constitutional rights actionable under section 1983. This decision is consistent with this Court's reluctance to create a constitutional tort for a claim of malicious prosecution and its refusal to transform defenses to libel suits into new doctrines and causes of action. Therefore, the case merits no further review and the petition should be denied.

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Respectfully submitted,

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